

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARIA DE LA O, et al.,
Plaintiffs,
v.
TOWN OF MATTAWA,
Defendant.

NO. CV-04-0192-EFS

**ORDER GRANTING AND DENYING IN PART
PLAINTIFFS' MOTION TO DISMISS
DEFENDANT'S STATE LAW COUNTERCLAIMS
AND TO STRIKE DEFENDANT'S NOERR-
PENNINGTON OR FEDERAL LAW
COUNTERCLAIM, OR, IN THE
ALTERNATIVE, FOR A MORE DEFINITE
STATEMENT**

MARIA FERNANDEZ, et al.,
Plaintiffs,
v.
TOWN OF MATTAWA,
Defendant.

NO. CV-05-0280-EFS

A telephonic hearing occurred in the above-captioned matters on February 3, 2009. *Maria De La O* Plaintiffs were represented by Kay Frank and Timothy Ford; *De La O* Plaintiffs were represented by Ty Duhamel. Jerry Moberg appeared on behalf of Defendant Town of Mattawa. Before the Court was Plaintiffs' Motion to Dismiss Defendant's State Law Counterclaims and to Strike Defendant's *Noerr-Pennington* or Federal Law

Counterclaim, or, in the Alternative, for a More Definite Statement.¹ (Ct. Rec. 858.) Mattawa opposes the motion, submitting that it has valid counterclaims under RCW 4.24.510, RCW 4.24.350, and federal law. After reviewing the submitted material and relevant authority and hearing oral argument, the Court is fully informed. This Order memorializes and supplement's the Court's oral ruling; Plaintiffs' motion is granted (RCW 4.24.510, RCW 4.24.350(2), and federal law) and denied (RCW 4.24.350(1)) in part.

A. Background

De La O Plaintiffs filed their initial complaint on June 11, 2004. (Ct. Rec. 1.) In relation to Mattawa, Plaintiffs alleged:

5.1 Defendant Esser caused the violations of plaintiffs' Fourth Amendment rights to occur and ratified them as the chief policymaking official of the Town of Mattawa. Those violations therefore resulted from and reflected the policies, customs and usages of the Town of Mattawa.

6.2 The above described actions of defendants Town of Mattawa, Esser, Blackburn, Jensen, Bumford, Coyne, Clawson, Vargas and Ditzel constitute a conspiracy to directly or indirectly cause the identified plaintiffs and others of their race and national origin to be deprived of the equal protection of the laws or of equal privileges and immunities under the laws, particularly the right to be free from unreasonable searches and seizures, rendering those defendants liable to the plaintiffs who were damaged thereby, pursuant to 42 U.S.C. § 1985(3).

6.3 The above described actions of defendants Bumford, Coyne, Clawson, Vargas, Ditzel, Hoezee, Boness, Smith, Town of Mattawa, Esser, Blackburn, Jensen and Grant County caused the identified plaintiffs to be deprived of rights guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States rendering those

¹ Plaintiffs are not seeking dismissal of Mattawa's affirmative defenses at this time.

1 defendants liable to the plaintiffs whose rights they
2 violated or caused to be violated pursuant to 42 U.S.C.
§ 1983.

3 A Second Amended Complaint, containing identical paragraphs 5.1, 6.2, and
4 6.3, was filed on August 20, 2004. (Ct. Rec. 8.) Mattawa filed its
5 answer on September 1, 2004 (Ct. Rec. 13), and then filed an amended
6 answer on September 8, 2004, asserting counterclaims under RCW 4.24.350
7 and RCW 4.24.510. (Ct. Rec. 13 p. 5 ¶ 14.)

8 *De La O* Plaintiffs amended their complaint again on April 28, 2005.
9 (Ct. Rec. 21.) Paragraphs 5.1, 6.2, and 6.3 remained identical, absent
10 capitalization of certain words. Mattawa answered on May 16, 2005,
11 asserting the same two state law counterclaims. (Ct. Rec. 39.)

12 The *Fernandez* action was filed in this Court on September 13, 2005.
13 (CV-05-280: Ct. Rec. 57.) This complaint alleges, in pertinent part:

14 140. Defendant Esser caused the violations of the plaintiffs'
15 Fourth Amendment rights to occur and ratified them as the chief
16 policymaking official of the Town of Mattawa. Those violations
therefore resulted from and reflected the policies, customs,
and usages of the Town of Mattawa.

17 145. The above described actions of the defendants Harden,
18 Bumford, Clawson, Coyne, Vargas, Ditzel, Hoezee, Boness, Smith,
19 Esser, Blackburn, Jensen, Town of Mattawa, and Grant County
caused the individual plaintiffs to be deprived of rights
20 guaranteed by the Fourth and Fourteenth Amendments to the
United States Constitution rendering those defendants liable
to the plaintiffs who were damaged thereby, pursuant to 42
U.S.C. § 1983.

21 147. The above described actions of defendants Harden,
22 Bumford, Clawson, Coyne, Vargas, Ditzel, Esser, Blackburn,
23 Jensen, and Town of Mattawa constitute a conspiracy to directly
24 or indirectly cause the individual plaintiffs and others of
their race and national origin to be deprived of the equal
25 protection of the laws or of equal privileges and immunities
under the laws, particularly the right to be free from
unreasonable searches and seizures, rendering those defendants
26 liable to the plaintiffs who were damaged thereby, pursuant to
42 U.S.C. § 1985(3).

1 The two (2) cases were consolidated for pretrial purposes on November 15,
2 2005. (CV-05-280: Ct. Rec. 98.)

3 On September 25, 2006, the Court declared RCW 4.24.350(2)
4 unconstitutional, but allowed Defendants to assert the following
5 counterclaim under RCW 4.24.350(1):

6 These Defendants claim the protections and right of action
7 granted by RCW 4.24.350(1), and that Plaintiffs have abused the
8 civil process by knowingly and maliciously instituting claims
9 in this action, which are both false and unfounded.
10 (Ct. Rec. 289 p. 13.) On December 20, 2006, the Court ruled that RCW
11 74.15.030 and 74.15.080 and WAC 288-296-0520 are unconstitutionally
12 overbroad. (Ct. Rec. 511.) The Court then granted Plaintiffs' Motion to
13 Dismiss Defendant Town of Mattawa's Affirmative Defense and Counterclaim
14 under RCW 4.24.510 (Ct. Rec. 391), due to Mattawa's failure to file an
15 opposition, ruling that "Town of Mattawa's RCW 4.24.510 affirmative
16 defense and counterclaim are dismissed." (Ct. Rec. 517 p. 2.)

17 State and Mattawa Defendants appealed the Court's rulings regarding
18 the state statutes' and regulation's unconstitutionality, but did not
19 seek relief from the dismissal of the RCW 4.24.510 counterclaim. (Ct.
20 Recs. 566 & 568.) Thereafter, Plaintiffs agreed to dismiss all claims
21 against the individual Mattawa Defendants. (Ct. Rec. 720.) The Court
22 agreed to this stipulated dismissal on June 5, 2007, thereby mooting the
23 pending appeal. (Ct. Rec. 741.)

24 The parties in their stipulation and related submissions (Ct. Rec.
25 693, 710, & 720) recognized that Plaintiffs could pursue their 42 U.S.C.
26 §§ 1983 and 1985(3) claims against Mattawa, and that Plaintiffs could
file the proposed amended complaints. (Ct. Recs. 692 & 696.) These
proposed amended complaints slightly altered paragraphs 5.1, 6.2, & 6.3

1 in *De La O* and paragraphs 140, 145, and 147 in *Fernandez*. On June 1,
2 2007, the Court granted *De La O* Plaintiffs leave to file the proposed
3 amended complaints. (Ct. Rec. 741.)

4 Thereafter, the State Defendants and Plaintiffs settled their
5 claims. (Ct. Rec. 798.) The Court determined that the settlement was
6 reasonable and agreed as part of the settlement to vacate the Court's
7 prior orders declaring RCW 4.24.350(2) and other state statutes and
8 regulations unconstitutional. (Ct. Rec. 832.)

9 Due to an oversight, Plaintiffs did not file their allowed amended
10 complaints until December 2, 2008. (Ct. Recs. 852 & 853.) These
11 complaints are identical to the previously-proposed complaints. Mattawa
12 filed its answers on December 15, 2008, asserting counterclaims under RCW
13 4.24.350, RCW 4.24.510, and federal law. (Ct. Recs. 855 & 856.)

14 **B. Authority and Analysis**

15 **1. RCW 4.24.510**

16 The Court's January 3, 2007 dismissal of Mattawa's RCW 4.24.510²
17 counterclaim is not impacted by the subsequent stipulated dismissals or
18 Court's Orders. The Court dismissed this counterclaim because Mattawa

19 ² RCW 4.24.510 states:

21 A person who communicates a complaint or information to any
22 branch or agency of federal, state, or local government . . .
23 is immune from civil liability for claims based upon the
24 communication to the agency or organization regarding any
25 matter reasonably of concern to that agency or organization.
26 A person prevailing upon the defense provided for in this
section is entitled to recover expenses and reasonable
attorneys' fees incurred in establishing the defense and in
addition shall receive statutory damages of ten thousand
dollars. Statutory damages may be denied if the court finds
that the complaint or information was communicated in bad
faith.

1 failed to respond to Plaintiffs' Motion to Dismiss Defendant Town of
2 Mattawa's Affirmative Defense and Counterclaim under RCW 4.24.510 (Ct.
3 Rec. 391). (Ct. Rec. 517 p. 2.) Given Mattawa's decision not to
4 respond to the dismissal motion and decision not to appeal the dismissal
5 Order, the Court will not revisit its dismissal Order because Plaintiffs
6 relied upon this ruling. Accordingly, the Court grants Plaintiffs'
7 motion in part - Mattawa's RCW 4.24.510 counterclaim is dismissed.

8 **2. RCW 4.24.350**

9 Although the Court previously ruled that RCW 4.24.350(2) is
10 unconstitutional, the Court vacated this ruling as a condition of
11 Plaintiffs' and State Defendants' stipulated dismissal. The Court need
12 not readdress RCW 4.24.350(2)'s constitutionality because subsection (2)
13 does not apply to a municipality:

14 (2) In any action, claim, or counterclaim brought by a *judicial*
15 *officer, prosecuting authority, or law enforcement officer* for
16 malicious prosecution arising out of the performance or
17 purported performance of the public duty of such officer, an
18 arrest or seizure of property need not be an element of the
19 claim, nor do special damages need to be proved. A judicial
20 officer, prosecuting authority, or law enforcement officer
21 prevailing in such an action may be allowed an amount up to one
thousand dollars as liquidated damages, together with a
reasonable attorneys' fee, and other costs of suit. A
government entity which has provided legal services to the
prevailing judicial officer, prosecuting authority, or law
enforcement officer has reimbursement rights to any award for
reasonable attorneys' fees and other costs, but shall have no
such rights to any liquidated damages allowed.

22 (Emphasis added.) Subsection (4) provides the following definitions:

23 (a) "Judicial officer" means a justice, judge, magistrate, or
24 other judicial officer of the state or a city, town, or county.

25 (b) "Prosecuting authority" means any officer or employee of
26 the state or a city, town, or county who is authorized by law
to initiate a criminal or civil proceeding on behalf of the
public.

(c) "Law enforcement officer" means a member of the state patrol, a sheriff or deputy sheriff, or a member of the police force of a city, town, university, state college, or port district, or a fish and wildlife officer or ex officio fish and wildlife officer as defined in RCW 77.08.010.

These terms' definitions make clear that subsection (2) does not apply to a city or town. Accordingly, Mattawa cannot take advantage of RCW 4.24.350(2) - even if constitutional.

The Court previously recognized that Defendants could pursue a counterclaim under subsection (1)³. The Court abides by this ruling, which has not been effected by the stipulated dismissals, and allows Mattawa to pursue a counterclaim under RCW 4.24.350(1).

Accordingly, Plaintiffs' motion is granted (RCW 4.24.350(2)) and denied (RCW 4.24.350(1)) in part.

3. Federal Law

In its December 2008 amended answers, Mattawa claims it "is immune from liability for communications its made in good faith governmental agencies and are entitled to statutory damages, fees, and costs pursuant to RCW 4.24.510 and *under federal law*." (Emphasis added.) In its

³ Subsection (1) states:

In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part of a conspiracy to misuse judicial process by filing an action known to be false and unfounded.

RCW 4.24.350(1).

ORDER ~ 7

1 response, Mattawa clarifies that it is relying upon the federal *Noerr*⁴-
2 *Pennington*⁵ doctrine as a basis for the federal counterclaim.

3 Under the *Noerr-Pennington* doctrine, "[t]hose who petition
4 government for redress are generally immune from antitrust liability."
5 *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, ,
6 508 U.S. 49, 56 (1993). The *Noerr-Pennington* doctrine is a recognized
7 defense in §§ 1983 and 1985 actions based on petitioning of public
8 authorities and can be utilized by a government entity. *Manistee Town*
9 *Center v. City of Glendale*, 227 F.3d 1090, 1092-93 (9th Cir. 2000).
10 However, the cases do not recognize a *Noerr-Pennington* counterclaim.

11 *Kearney v. Foley and Lardner*, 553 F. Supp. 2d 1178 (S.D. Cal. 2008),
12 does not support Mattawa's argument that there is a *Noerr-Pennington*
13 counterclaim. The district court in *Kearney* held that the defendant was
14 entitled to attorney fees and costs under the California anti-SLAPP⁶
15 statute for its time associated with responding to both state and federal
16 claims premised on defendants' actions and communications during the
17 underlying eminent domain process and condemnation action - a common
18 factual scenario. *Kearney* did not recognize a *Noerr-Pennington*
19 counterclaim.

20 Therefore, the Court grants Plaintiffs' motion to strike the federal
21 *Noerr-Pennington* counterclaim. Plaintiffs' alternative request for a

22 ⁴ *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127
23 (1961) ("*Noerr*").

24 ⁵ *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)
25 ("*Pennington*").

26 ⁶ SLAPP = Strategic lawsuit against public participation.

1 more definite statement under Federal Rule of Civil Procedure 12(e) is
2 moot.

3 **C. Conclusion**

4 For the reasons given above, **IT IS HEREBY ORDERED:** Plaintiffs'
5 Motion to Dismiss Defendant's State Law Counterclaims and to Strike
6 Defendant's *Noerr-Pennington* or Federal Law Counterclaim, or, in the
7 Alternative, for a More Definite Statement (**Ct. Rec. 858**) is **GRANTED** (RCW
8 4.24.510, RCW 4.24.350(2), and federal law) **and DENIED** (RCW 4.24.350(1))
9 **IN PART.**

10 **IT IS SO ORDERED.** The District Court Executive is directed to enter
11 this Order and provide copies to counsel.

12 **DATED** this 3rd day of February 2009.

13
14 S/ Edward F. Shea
15 EDWARD F. SHEA
16 United States District Judge

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